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6

7 **UNITED STATES DISTRICT COURT**  
8 **EASTERN DISTRICT OF WASHINGTON**

9 NICHOLAS ROLOVICH,

10 Plaintiff,

11 v.

12 WASHINGTON STATE  
13 UNIVERSITY, an agency of the  
14 State of Washington; PATRICK  
15 CHUN, Director of Athletics for  
Washington State University, in  
his individual capacity; and JAY  
INSLEE, Governor, in his official  
capacity,

16 Defendants.

17 NO. 2:22-cv-00319-TOR

18 DEFENDANT GOVERNOR  
19 JAY INSLEE'S MOTION TO  
20 DISMISS

21 May 11, 2023  
With Oral Argument: 11 a.m.  
Courtroom 902

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## I. INTRODUCTION

Faced with a virulent COVID-19 variant and extreme stress to the State’s healthcare system, Governor Jay Inslee issued Proclamation 21-14, which prohibited certain state agency, healthcare, and education workers from working after October 18, 2021, if not fully vaccinated against COVID-19. The Proclamation further stated that workers need not get vaccinated if they were entitled to accommodations under antidiscrimination statutes but left accommodation decisions to employers covered by the Proclamation. Under the Proclamation, Washington State University (WSU) terminated Nicholas Rolovich’s employment as WSU’s head football coach, because he was not fully vaccinated against COVID-19 and WSU would experience undue hardship in providing an accommodation. Rolovich now sues WSU, his former employer; Patrick Chun, WSU’s Director of Athletics; and Governor Inslee under various contract, statutory, and constitutional theories.

The Court must dismiss Rolovich’s claims against the Governor for at least five reasons. First, Rolovich’s state constitutional claim must be dismissed because there is no private right of action for damages under the state constitution. Second, his federal claims must be dismissed because Governor Inslee is sued in his official capacity and is not a “person” under 42 U.S.C. § 1983. Third, the Proclamation was neutral, generally applicable, and rational. Fourth, Rolovich’s contract claim fails because Governor Inslee was not a party to the employment agreement between WSU and Rolovich. And fifth, all of his

1 employment-based claims fail because the Governor was not Rolovich's  
 2 employer and did not terminate Rolovich's employment.

## 3 II. STATEMENT OF FACTS<sup>1</sup>

### 4 A. The COVID-19 Pandemic and Vaccines

5 The COVID-19 pandemic is a global public health disaster that upended  
 6 life as we knew it. On February 29, 2020, the Governor declared a state of  
 7 emergency due to COVID-19. Procl. 20-05; *see Slidewaters LLC v. Wash. State*  
*Dep't of Lab. & Indus.*, 4 F.4th 747, 753 (9th Cir. 2021), *cert. denied*, 142 S. Ct.  
 8 779 (2022). That state of emergency ended on October 31, 2022. *See*  
 9 Procl. 20-05.1.

10 In the State, there have been over 1.9 million confirmed COVID-19 cases,  
 11 more than 81,600 Washingtonians have been hospitalized from the virus, and  
 12 more than 15,600 Washingtonians have died.<sup>2</sup>

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15 <sup>1</sup> The publicly available government records and data cited herein—  
 16 including from the U.S. Food and Drug Administration (FDA), the U.S. Centers  
 17 for Disease Control and Prevention (CDC), and the Washington State  
 18 Department of Health (DOH)—are properly subject to judicial notice. *See* Fed.  
 19 R. Evid. 201; *Kater v. Churchill Downs Inc.*, 886 F.3d 784, 788 n.3 (9th  
 20 Cir. 2018). The Governor requests the Court to take judicial notice of such  
 21 materials. *Tellabs, Inc. v. Makor Issues & Rts.*, 551 U.S. 308, 322 (2007).

22 <sup>2</sup> DOH, COVID-19 Data Dashboard, *Disease Activity and Testing*, (last

1           The FDA has approved or authorized four COVID-19 vaccines. The CDC  
 2 considers all four safe and effective in reducing the risk of severe illness or death  
 3 due to COVID-19.<sup>3</sup> The CDC emphasized that “[a]lthough the epidemiology of  
 4 COVID-19 might change as new variants emerge, vaccination remains the safest  
 5 strategy for averting future SARS-CoV-2 infections, hospitalizations, long-term  
 6 sequelae, and death.”<sup>4</sup> Hundreds of millions of doses have been administered in  
 7 the United States.<sup>5</sup> Based on comprehensive data collected, the CDC has  
 8 concluded that the vaccines are safe, with serious adverse reactions remaining  
 9 exceedingly rare.<sup>6</sup>

10 \_\_\_\_\_  
 11 updated Mar. 8, 2023, 4:51 PM), <https://bit.ly/3AKV0Gq>.

12           <sup>3</sup> CDC, COVID-19, *Safety of COVID-19 Vaccines*, (updated Mar. 7, 2023),  
 13 <https://bit.ly/3uWZusR>.

14           <sup>4</sup> Tomás M. León, et al., *COVID-19 Cases and Hospitalizations by*  
 15 *COVID-19 Vaccination Status and Previous COVID-19 Diagnosis — California*  
 16 *and New York, May–November 2021*, 71 MORBIDITY & MORTALITY WEEKLY  
 17 REPORT 125, 130 (2022), <https://bit.ly/3WnmDim>.

18           <sup>5</sup> CDC, COVID Data Tracker, *COVID-19 Vaccinations in the*  
 19 *United States*, [https://covid.cdc.gov/covid-data-tracker/#vaccinations\\_vacc-](https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-total-adminrate-total)  
 20 [total-adminrate-total](https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-total-adminrate-total) (last visited Feb. 20, 2023).

21           <sup>6</sup> CDC, COVID-19, *Selected Adverse Events Reported after COVID-19*  
 22 *Vaccination* (updated Mar. 7, 2023), [DEFENDANT GOVERNOR JAY  
 INSLEE'S MOTION TO DISMISS  
 NO. 2:22-cv-00319-TOR](https://www.cdc.gov/coronavirus/2019-</a></p>
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1      **B. Proclamation 21-14**

2            On August 9, 2021, in the midst of the Delta-driven surge in COVID-19  
 3 cases and stress to the State's healthcare system, Governor Inslee issued  
 4 Proclamation 21-14, prohibiting certain state agency workers and healthcare  
 5 workers from continuing to work after October 18, 2021, without being fully  
 6 vaccinated against COVID-19, *i.e.*, two weeks post-final dose. Proclamation  
 7 21-14 was amended several more times. For example, Proclamation 21-14.1  
 8 (issued on August 20, 2021) extended this requirement to education workers, and  
 9 Proclamation 21-14.2 extended it to on-site contractors for certain state entities.  
 10 The Proclamation culminated in Proclamation 20-14.6, which rescinded and  
 11 terminated Proclamation 20-14, et seq., on October 31, 2022.

12            The Proclamation applied to over 600,000 workers in Washington across  
 13 three covered sectors—state government, health care, and education. *Wise v.*  
 14 *Inslee*, No. 2:21-cv-0288-TOR, 2021 WL 4951571, at \*1 (E.D. Wash. Oct. 25,  
 15 2021). As the Proclamation then observed, “healthcare workers face COVID-19  
 16 exposures in a variety of healthcare settings, with those involving direct patient  
 17 care likely at higher risk.” Proclamation by Governor Jay Inslee, No. 21-14.1,  
 18 at 2 (Wash. Aug. 20, 2021), [https://bit.ly/Proclamation21-14\\_1](https://bit.ly/Proclamation21-14_1). Educators work  
 19 daily amidst mass gatherings of unvaccinated individuals—in classrooms,  
 20 gymnasiums, and cafeterias. And state employees—ranging from Department of

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22            [ncov/vaccines/safety/adverse-events.html](https://www.doh.wa.gov/HealthTopics/Coronavirus-ncov/vaccines/safety/adverse-events.html).

1 Corrections and Washington State Patrol officers to Child Protective Service  
 2 social workers to Liquor and Cannabis Board investigators—may “interact with  
 3 the public on a regular basis,” including in congregate environments. *Id.* at 3.

4 The Proclamation provided that covered workers need not get vaccinated  
 5 if they are entitled under antidiscrimination statutes to “disability-related  
 6 reasonable accommodations” or “sincerely held religious belief  
 7 accommodations[.]” *Id.* at 5. The Proclamation expressly required that “State  
 8 Agencies, operators of Educational Settings, and operators of Health Care  
 9 Settings” provide accommodations required under “the Americans With  
 10 Disabilities Act of 1990 (ADA), the Rehabilitation Act of 1973 (Rehabilitation  
 11 Act), Title VII of the Civil Rights Act of 1964 (Title VII), the Washington Law  
 12 Against Discrimination (WLAD), and any other applicable law” and that as  
 13 provided in these laws, employers were not required to “provide accommodations  
 14 if they would cause undue hardship.” *Id.*

15 There have been several unsuccessful challenges to the Governor’s  
 16 Proclamation and employers’ implementations thereof, including cases  
 17 dismissed by this Court. See, e.g., *Wise v. Inslee*, No. 2:21-cv-0288-TOR, 2022  
 18 WL 1243662 (E.D. Wash. Apr. 27, 2022), *appeal dismissed*, No. 22-35426, 2022  
 19 WL 17254335 (9th Cir. Oct. 7, 2022) (granting State defendants’ motion for  
 20 judgment on the pleadings); *Bacon v. Woodward*, No. 2:21-cv-0296-TOR, 2022  
 21 WL 2381021 (E.D. Wash. June 30, 2022), *appeal docketed*, No. 22-35611 (9th  
 22 Cir.) (granting City of Spokane’s motion for judgment on the pleadings); *Pilz v.*

1     *Inslee*, No. 3:21-cv-05735-BJR, 2022 WL 1719172 (W.D. Wash. May 27, 2022),  
 2     appeal docketed, No. 22-35508 (9th Cir.) (granting State defendants' motion for  
 3     judgment on the pleadings); *Cleary v. Inslee*, No. 21-2-01674-34 (Thurston Cnty.  
 4     Super. Ct.) (denying plaintiffs' motion for preliminary injunction; granting in  
 5     part State defendants' motion for judgment on the pleadings and dismissing the  
 6     remaining claims on plaintiffs' motion), *Johnson v. Inslee*, No. 21-2-01827-34  
 7     (Thurston Cnty. Super. Ct.) (denying plaintiff's TRO).<sup>7</sup>

8     **C. Rolovich's Lawsuit**

9                 Nicholas Rolovich is the former head football coach for Washington State  
 10 University. First Am. Compl. (ECF No. 1-1 at 73-110) ¶ 11. He did not want to  
 11 be vaccinated against COVID-19, so he sought a religious exemption and  
 12 accommodation. *Id.* ¶¶ 33, 63. WSU concluded it could not offer an

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14                 <sup>7</sup> Nationally, lawsuits to strike down COVID-19 vaccine requirements  
 15 have largely been unsuccessful. *See, e.g., Does 1–3 v. Mills*, 142 S. Ct. 1112  
 16 (2022) (Mem.) (denying certiorari to a case in which the First Circuit rejected a  
 17 constitutional challenge to a Maine order requiring its healthcare workers be  
 18 vaccinated against COVID-19 as a condition of employment); *Dr. A. v. Hochul*,  
 19 142 S. Ct. 2569 (2022) (Mem.) (similar); *see also Doe v. San Diego Unified Sch.*  
 20 *Dist.*, 19 F.4th 1173 (9th Cir. 2021) (affirming dismissal of a Free Exercise  
 21 challenge to school district's COVID-19 vaccine policy without a sincerely-held  
 22 religious belief exemption).

accommodation because it would cause an undue hardship to WSU. *Id.* ¶¶ 70, 92. Based on Rolovich's refusal to get fully vaccinated against COVID-19 and lack of approved accommodation, WSU terminated Rolovich for cause. *Id.* ¶ 15.

Rolovich's lawsuit is against WSU; Patrick Chun, Director of Athletics for WSU, in his individual capacity; and Jay Inslee, the Governor of Washington, in his official capacity. Rolovich's claims include: breach of contract (Count I); and violations of WLAD (Count II), Wash. Const. art. I, § 11 (Count III), Title VII, 42 U.S.C. § 2000e (Count IV), the Free Exercise Clause of U.S. Const. amend. I (Count VI), and Due Process Clause of U.S. Const. amend. XIV (Count VII).<sup>8</sup> Nearly all of Rolovich's allegations are aimed at the exemption and accommodation process implemented by WSU. *See generally* First Am. Compl.

### III. LEGAL STANDARD

Dismissal under Fed. R. Civ. P. 12(b)(6) may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleging such theory. *See Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 965 (9th Cir. 2018). While the Court must accept as true a complaint’s well-pleaded facts, those facts must nonetheless “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). On a Rule 12(b)(6) motion, a court may

<sup>8</sup> Rolovich also asserts a claim specifically against Chun in his individual capacity (Count V).

1 consider documents attached to a complaint, documents incorporated by  
 2 reference in a complaint, or matters of judicial notice without converting the  
 3 motion into a motion for summary judgment. *United States v. Ritchie*, 342 F.3d  
 4 903, 908 (9th Cir. 2003). To the extent documents referenced in a complaint  
 5 contradict a plaintiff's conclusory allegations, the Court is not required to  
 6 accept those allegations as true. *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293,  
 7 1295–96 (9th Cir.1998).

#### 8                          IV. ARGUMENT

##### 9                          A. **There Is No Private Right of Action for Violations of the Washington 10 Constitution, so Rolovich's State Constitutional Claim (Count III)       Must Be Dismissed with Prejudice**

11                          No private right of action exists under the Washington Constitution.  
 12 "Washington courts have consistently rejected invitations to establish a cause of  
 13 action for damages based upon constitutional violations 'without the aid of  
 14 augmentative legislation[.]'" *Blinka v. Wash. State Bar Ass'n*, 36 P.3d 1094,  
 15 1102 (Wash. App. 2001) (quoting *Sys. Amusement, Inc. v. State*, 500 P.2d 1253,  
 16 1254 (Wash. App. 1972)); *see also Spurrell v. Bloch*, 701 P.2d 529, 535 (Wash.  
 17 App. 1985) ("The constitutional guarantee of due process, Const. art. 1, § 3, does  
 18 not of itself, without the aid of augmenting legislation, establish a cause of action  
 19 for money damages against the state . . . ."); *accord Floyd v. City of Grand  
 20 Coulee*, No. 2:21-cv-00211-SAB, 2021 WL 4699202, at \*5 (E.D. Wash. Oct. 7,  
 21 2021) (dismissing state constitutional claims where the plaintiff "[did] not plead  
 22 any statutory cause of action that allow[ed] him to bring a lawsuit for violations

1 of [the] constitutional rights[]”); *Dunn v. City of Seattle*, 420 F. Supp. 3d 1148,  
 2 1156 (W.D. Wash. 2019) (“Washington courts have rejected attempts to create a  
 3 private right of action for damages under the Washington Constitution absent  
 4 guidance from the legislature.”); *cf. Reid v. Pierce County*, 961 P.2d 333, 343  
 5 (Wash. 1998) (declining to create a cause of action for damages for a violation of  
 6 the constitutional right to privacy).

7 No augmenting legislation exists for an alleged violation of article I,  
 8 section 11 (Count III), and Rolovich cites none. *See* First Am. Compl.  
 9 ¶¶ 115–18. Washington has no state law counterpart to 42 U.S.C. § 1983. For this  
 10 reason, Rolovich’s claim under article I, section 11 of the Washington  
 11 Constitution fails as a matter of law and must be dismissed with prejudice.

12 **B. Rolovich’s Federal Claims in Counts VI and VII Must Be Dismissed  
 13 with Prejudice Because Governor Inslee Is Not a “Person” Subject to  
 14 Suit Under Section 1983**

15 State officials acting in their official capacities are not persons subject to  
 16 suit under 42 U.S.C. § 1983, unless they are sued for prospective injunctive relief.  
 17 *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 70–71 (1989); *see also Cipolla*  
 18 *v. Ariz. Dep’t of Econ. Sec.*, 57 F.3d 1076 (9th Cir. 1995) (claims for damages  
 19 under § 1983 against state agency and the individually-named defendants in their  
 20 official capacities were properly dismissed); *Wright v. Airway Heights Corr. Ctr.*  
 21 *MSU*, No. 2:20-cv-00436-MKD, 2022 WL 17543678, at \*3 (E.D. Wash. Dec. 8,  
 22 2022), *appeal docketed*, No. 22-36057 (9th Cir. 2022) (“State agencies and state  
 23 officials sued in their official capacity are categorically not subject to suit under

1       42 U.S.C. § 1983.”). Although “state officials literally are persons,” an official-  
 2 capacity suit against a state officer “is not a suit against the official but rather is  
 3 a suit against the official’s office. . . . As such it is no different from a suit against  
 4 the State itself.” *Will*, 491 U.S. at 71.

5              Here, the Governor is sued only in his official capacity, First Am. Compl.  
 6 ¶ 14, and Rolovich seeks only retrospective damages—not prospective injunctive  
 7 relief, *id.* at p. 31 (Prayer for Relief). Thus, Governor Inslee is not a “person”  
 8 subject to suit under 42 U.S.C. § 1983. The Court should accordingly dismiss  
 9 with prejudice Rolovich’s Free Exercise claim under the First Amendment  
 10 (Count VI) and Due Process claim under the Fourteenth Amendment (Count VII)  
 11 as against the Governor.

12           **C. Rolovich’s Free Exercise Claim Fails as a Matter of Law (Count VI)**

13           Rolovich’s Free Exercise Clause claim appears to be premised in part on  
 14 the Proclamation’s “creation of a formal mechanism for granting exemptions,”  
 15 First Am. Compl. ¶ 143, but that theory conflicts with controlling precedent.<sup>9</sup>  
 16 Under the Supreme Court’s jurisprudence on “individualized exemptions,” a  
 17 policy’s general applicability is undermined only when it allows for *secular*  
 18 individualized exemptions, not *religious* exemptions. *See, e.g., Fulton v. City of*

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20           <sup>9</sup> Despite this allegation, Rolovich now contends that this case “is not and  
 21 has never been a challenge to Washington State’s or any of the Defendants’  
 22 responses to the COVID-19 pandemic.” ECF No. 19 at 6.

1      *Phila.*, 141 S. Ct. 1868, 1878 (2021) (city contract prohibiting foster care  
 2 providers from rejecting prospective parents based on sexual orientation was not  
 3 generally applicable where it gave Commissioner “sole discretion” to grant an  
 4 “exception”); *id.* at 1921 (Alito, J., concurring in judgment) (noting “confusion”  
 5 over the “special rule” on when a law is not “generally applicable” due to  
 6 “secular exemptions” (emphasis added)). Rolovich’s allegation that the  
 7 availability of exemptions rendered the Proclamation not generally applicable  
 8 would lead to the counterintuitive conclusion that the Proclamation should have  
 9 eliminated religious exemptions—a constitutional policy, but one that would  
 10 leave religious objectors far worse off. *See, e.g., Nikolao v. Lyon*, 875 F.3d 310,  
 11 316 (6th Cir. 2017) (noting that mother who successfully sought religious waiver  
 12 from state-mandated vaccinations for her children “has not been denied any legal  
 13 right on the basis of her religion[ ]” and “[c]onstitutionally, [she] has no right to  
 14 an exemption[ ]” (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905))).

15      In the context of COVID-19 vaccination requirements, courts across the  
 16 country, including this one, have all but unanimously concluded that the  
 17 requirements are neutral and generally applicable—and upheld them under  
 18 rational basis review. *See, e.g., Does I–6 v. Mills*, 16 F.4th 20, 32 (1st Cir. 2021),  
 19 *cert. denied sub nom. Does I–3 v. Mills*, 142 S. Ct. 1112 (2022) (Mem.); *See We*  
 20 *The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 290 (2d Cir. 2021), *opinion*  
 21 *clarified*, 17 F.4th 368 (2d Cir. 2021), and *cert. denied sub nom. Dr. A. v. Hochul*,  
 22 142 S. Ct. 2569 (2022); *Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1177

1 (9th Cir. 2021), *reconsideration en banc denied*, 22 F.4th 1099 (9th Cir. 2022)  
 2 (school district vaccination policy that provided for medical exemptions but not  
 3 medical exemptions “neutral and generally applicable”); *see also Wise*, 2021 WL  
 4 4951571, at \*2 (“Federal courts have routinely analyzed such cases using rational  
 5 basis and regularly reject cases similar to this one that challenge vaccine  
 6 mandates based on free exercise of religion.”).

7 The Proclamation readily meets rational basis review because it is  
 8 undisputed that protecting the public from COVID-19 is a compelling state  
 9 interest. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020)  
 10 (per curiam); *Does 1–6*, 16 F.4th at 32 (“Few interests are more compelling than  
 11 protecting public health against a deadly virus.”). Because vaccines are highly  
 12 safe and effective against COVID-19, requiring those who work in health care  
 13 settings, educational settings, and state government to be vaccinated is rationally  
 14 related to stemming the spread of the virus. *See, e.g., Wise*, 2022 WL 1243662,  
 15 at \*4; *Does 1–6*, 16 F.4th at 32; *We The Patriots*, 17 F.4th at 290; *cf. Kheriaty v.*  
 16 *Regents of the Univ. of Cal.*, No. 22-55001, 2022 WL 17175070, at \*2 (9th Cir.  
 17 Nov. 23, 2022) (Mem.) (substantive due process challenge to university vaccine  
 18 policy failed under rational basis review).

19 **D. Rolovich’s Contractual Claim (Count I) Should be Dismissed with  
 20 Prejudice Because Governor Inslee Was Not a Party to the  
 21 Employment Agreement with Rolovich**

22 It is unclear if Rolovich intends to assert his breach of contract claim  
 against the Governor. The employment agreement Rolovich attached to his

1      Complaint states: “This Employment Agreement (Agreement) is made between  
 2      Washington State University (University) and Nicholas R. Rolovich  
 3      (Employee)[.]” ECF No. 1-1 at 36. Rolovich also correctly alleges that his  
 4      employment agreement was with WSU—not the Governor. *See, e.g.*, First Am.  
 5      Compl. ¶¶ 4–5, 16–23. Additionally, all of the allegations under Count I are  
 6      directed only at the WSU Defendants. *See, e.g., id.* ¶¶ 99 (“Pursuant to the terms  
 7      of WSU’s employment contract with Mr. Rolovich . . . .”), 100 (“WSU  
 8      terminated Mr. Rolovich . . . .”), 101 (“WSU breached its contract . . . .”), 102  
 9      (“WSU violated its own policies . . . .”), 103 (“Mr. Rolovich reasonably relied  
 10     upon WSU’s representation . . . .”), 105 (“By taking punitive action . . . WSU  
 11     breached its employment agreement with Mr. Rolovich.”), 111 (“WSU’s  
 12     decision and actions in terminating Mr. Rolovich . . . .”). Yet Rolovich generally  
 13     seeks “damages against Defendants” for this claim. *Id.* ¶ 111.

14       Because Rolovich does not allege that Governor Inslee was a party to his  
 15     employment agreement or even involved with his employment contract, but also  
 16     does not expressly limit Count I to the WSU Defendants, Governor Inslee  
 17     respectfully requests the Court dismiss this claim with prejudice against the  
 18     Governor for failure to state a claim. *See Lehrer v. State*, 5 P.3d 722, 727 (Wash.  
 19     App. 2000) (under Washington law, a plaintiff “must prove a valid contract  
 20     between the parties, breach, and resulting damage[.]”); *Schweickert v. Hunts*  
 21     *Point Ventures, Inc.*, No. 13-cv-675RSM, 2014 WL 6886630, at \*4 (W.D. Wash.  
 22     Dec. 4, 2014) (“Plaintiff’s breach of contract claim against the [defendants] fails

1 because no contract is alleged to exist between Plaintiff and the [defendants].”);  
 2 *Morgan v. Capitol Indem. Corp.*, No. C17-0754-JCC, 2017 WL 2717576, at \*2  
 3 (W.D. Wash. June 23, 2017) (breach of contract claim failed where defendants  
 4 did not have a contractual relationship with plaintiffs); *Galyean v. OneWest Bank*  
 5 *FSB*, No. C10-827 MJP, 2010 WL 5138396, at \*3 (W.D. Wash. Dec. 9, 2010)  
 6 (dismissing plaintiff’s breach of implied covenant of good faith and fair dealing  
 7 claim because the defendant did not owe a duty to the plaintiff and the economic  
 8 loss rule).

9       **E. Rolovich’s Employment-Based Claims (Counts I, II, III, IV, VI,  
 10 and VII) Should Be Dismissed with Prejudice Because Governor  
 11 Inslee Was Not Rolovich’s Employer and Did Not Terminate  
 12 Rolovich’s Employment**

13       Likewise, Rolovich’s claims that are vaguely asserted against all  
 14 “Defendants” should be dismissed as to Governor Inslee. Those claims are  
 15 premised on Rolovich’s employment relationship with WSU, but, as a matter of  
 16 both fact and law, the Governor was not Rolovich’s employer.

17       First, as a matter of law, the Governor was not Rolovich’s employer.  
 18 Instead, “[t]he governance of Washington State University” is “vested in a board  
 19 of regents.” Wash. Rev. Code § 28B.30.100(1)(a). The regents have “full control  
 20 of the university,” and “[e]mploy . . . employees of the university, who, except  
 21 as otherwise provided by law, shall hold their positions during the pleasure of  
 22 said board of regents.” Wash. Rev. Code § 28B.30.150(1)–(2); *see also* Wash.  
 Rev. Code § 28B.10.528 (allowing regents to delegate powers). There is no basis

1 to conclude that the Governor had any authority over Rolovich's employment.<sup>10</sup>  
 2 Washington state law establishes that WSU was Rolovich's employer, not  
 3 Governor Inslee. *See also* 42 U.S.C. § 2000e(b) & (f) (defining "employee" and  
 4 "employer" under Title VII); 42 U.S.C. § 2000e-2(a) (defining employer  
 5 practices prohibited by Title VII); Wash. Rev. Code § 49.60.180 (defining unfair  
 6 practices of employers). It is also nonsensical for Rolovich to argue that the  
 7 Governor is a proper Defendant as a representative of the State, which, he claims  
 8 was a party to his employment contract. ECF No. 14 at 10. Rolovich named  
 9 WSU, and WSU was his employer and the party to his employment contract.

10 Second, as a matter of fact, Rolovich's own pleadings and allegations  
 11 confirm that he lacked an employment relationship with the Governor. The  
 12 employment agreement Rolovich attached to his Complaint states the agreement  
 13 is between WSU and Rolovich. ECF No. 1-1 at 36. Rolovich's First Amended  
 14

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15 <sup>10</sup> And even if the Governor did have supervisory authority, this is  
 16 insufficient to establish a Title VII cause of action against the Governor. *Miller*  
 17 *v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587 (9th Cir. 1993) (individual employees  
 18 and supervisors cannot be liable under Title VII); *Magden v. Easterday Farms*,  
 19 No. 2:16-CV-00068-JLQ, 2017 WL 1731705, at \*5 (E.D. Wash. May 3, 2017)  
 20 (collecting cases). Additionally, as noted in the WSU's Motion, Rolovich fails to  
 21 even allege a bona fide religious belief, negating both his Title VII and WLAD  
 22 claims.

1      Complaint also alleges his employment agreement was with WSU. *See, e.g.*, First  
 2      Am. Compl. ¶¶ 4, 5, 11, 15–23. Rolovich further alleges that only WSU was  
 3      involved in reviewing and responding to his request for a religious exemption  
 4      and accommodation. *Id.* ¶¶ 30–49, 59–70. Finally, Rolovich alleges that only  
 5      WSU terminated his employment. *Id.* ¶¶ 90–97. Consistent with these facts,  
 6      Rolovich filed an EEOC and tort claim only against WSU. *See id.* ¶¶ 6, 8.<sup>11</sup> In  
 7      short, it is undisputed that the Governor was not Rolovich’s employer.

8           Despite the lack of an employment relationship with the Governor,  
 9      Rolovich makes several claims premised on adverse employment actions,  
 10     without specifying if he is making them only against the WSU Defendants or also  
 11     against Governor Inslee. Count V is the only claim that Rolovich specifies is  
 12     against only one Defendant. *See id.* ¶¶ 130–39 (alleging a claim against  
 13     Defendant Chun in his individual capacity). In the rest of his claims, Rolovich  
 14     prays for “damages against Defendants” based on his termination. *Id.* ¶¶ 111,  
 15     114, 118, 129, 146, 149. None of these claims state a claim against the Governor.

16           As mentioned above, Count I (Breach of Contract) discusses only WSU  
 17     conduct. First Am. Compl. ¶¶ 98–111. Likewise, Count II (WLAD) alleges

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19               <sup>11</sup> The failure to file an EEOC charge against Governor Inslee is an  
 20     additional reason to dismiss Rolovich’s Title VII claim (Count IV) against the  
 21     Governor. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 120 (2002);  
 22     42 U.S.C. § 2000e-5(e)(1).

discrimination in employment from “WSU’s decision to terminate Mr. Rolovich[.]” *Id.* ¶ 113. Count III contends that “Defendants’ threat to fire Mr. Rolovich” discriminated against Rolovich based on his religion, yet, as noted above, only WSU had the power to hire and fire Rolovich. *Id.* ¶¶ 117–18. Rolovich’s Title VII claim (Count V) is also premised on discrimination in employment and WSU-specific action. *Id.* ¶¶ 119–29. Like the others, Counts VI (First Amendment-Free Exercise) and VII (Fourteenth Amendment-Due Process (As Applied)) are also premised on Rolovich’s employment termination and allegations of WSU-specific actions. *Id.* ¶¶ 142–46, 148–49. None are based on conduct by Governor Inslee. *See Kane v. Mednax Servs., Inc.*, No. 2:22-cv-0159-TOR, 2022 WL 16748784, at \*3 (E.D. Wash. Nov. 7, 2022), *appeal docketed*, No. 22-36010 (9th Cir. 2022) (dismissing WLAD violation claims because plaintiff failed to allege defendant was an employer); *cf. Craig v. M & O Agencies, Inc.*, 496 F.3d 1047, 1058 (9th Cir. 2007) (affirming dismissal of Title VII claim against non-employer co-workers).

Rolovich asserts that Governor Inslee was a “proximate” cause of Rolovich’s termination, First Am. Compl. ¶ 97, but this conclusory allegation is insufficient to defeat a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (“[T]he tenet that a court must accept a complaint’s allegations as true is inapplicable to threadbare recitals of a cause of action’s elements, supported by mere conclusory statements.”). First, it bears noting that the few allegations actually in Rolovich’s First Amended Complaint about the Governor are

1     irrelevant to this motion to dismiss and are flatly contradicted by the face of the  
 2     Proclamation. For example, Rolovich alleges that his interpretation of Chun's  
 3     statement to him was that *Chun* thought that the Governor “‘did this’”  
 4     (presumably issued Proclamation 21-14), to “come after Mr. Rolovich and  
 5     WSU.” First Am. Compl. ¶ 40. But it is absurd and implausible that a  
 6     Proclamation affecting hundreds of thousands of workers across state  
 7     government, health care, and education and issued during a serious surge of  
 8     COVID-19 would be issued to “come after” one person.

9                 The allegations also ignore that the Proclamation specifically required  
 10    employers to “provide disability-related reasonable accommodations and  
 11    sincerely held religious belief accommodations to the requirements” of the  
 12    Proclamation unless those accommodations caused “undue hardship.”  
 13    Procl. 21-14.1 at 5. The Proclamation required employers to “conduct[] an  
 14    individualized assessment and determination of each individual’s need and  
 15    justification for an accommodation[.]” *Id.* at 6. The Proclamation did not dictate  
 16    a particular outcome for employers (like WSU) making assessments for  
 17    disability-related or religious belief accommodations. *See generally id.*

18                 Finally, as noted above, there can be no dispute that WSU retained full  
 19    decision-making authority over Rolovich’s employment, subject to applicable  
 20    law. Wash. Rev. Code § 28B.30.150(1)–(2). Here, that law required WSU to  
 21    provide Rolovich with any legally required accommodation, and it is simply  
 22    irrelevant what someone in the Governor’s Office might have said prior to the

1 issuance of the Proclamation. Rolovich's meager attempt to appeal to the "cat's  
 2 paw" theory of employment liability is inapt because he identifies no legal basis  
 3 upon which Governor Inslee had supervisory authority over WSU's employment  
 4 decisions. *See generally Staub v. Proctor Hosp.*, 562 U.S. 411, 422 (2011)  
 5 (recognizing that an *employer* may be liable when a *subordinate* performs an act  
 6 motivated by impermissible animus that is intended to cause an adverse  
 7 employment action). At most, this kind of theory can make an *employer*  
 8 responsible for the acts and animus of a third party, but it does not make the third  
 9 party an employer for purposes of an employment lawsuit.

10 Because Rolovich neither alleges nor establishes that Governor Inslee was  
 11 Rolovich's employer, all of his employment-based claims fail as a matter of law  
 12 and should be dismissed with prejudice.

13 **V. CONCLUSION**

14 In sum, Rolovich fails to state a claim against Governor Inslee, so all of  
 15 them should be dismissed against Governor Inslee for the following reasons:

Count	Bases for Dismissing Governor Inslee
I. Breach of Contract; Breach of Implied Covenant of Good Faith and Fair Dealing	<ul style="list-style-type: none"> <li>• Not a party to the contract</li> <li>• Not Rolovich's employer</li> </ul>
II. Washington Law Against Discrimination	<ul style="list-style-type: none"> <li>• Not Rolovich's employer and no adverse/discriminatory action</li> </ul>
III. Washington Constitution, art. I, § 11	<ul style="list-style-type: none"> <li>• No cause of action for damages under Washington Constitution</li> </ul>
IV. Title VII (42 U.S.C. § 2000e)	<ul style="list-style-type: none"> <li>• Not Rolovich's employer and no adverse/discriminatory action</li> </ul>

Count	Bases for Dismissing Governor Inslee
V. 42 U.S.C. § 1983 (Free Exercise and Due Process)	<ul style="list-style-type: none"> <li>Expressly asserted only against Defendant Patrick Chun</li> </ul>
VI. 42 U.S.C. § 1983 (Free Exercise)	<ul style="list-style-type: none"> <li>Not a “person” under § 1983</li> <li>Not Rolovich’s employer and no adverse/discriminatory action</li> <li>Proclamation neutral, generally applicable, and rational</li> </ul>
VII. Fourteenth Amendment-Due Process (As Applied)	<ul style="list-style-type: none"> <li>Not a “person” under § 1983</li> <li>Not Rolovich’s employer and no adverse/discriminatory action</li> </ul>

Governor Inslee asks the Court to dismiss the claims in the First Amended Complaint alleged against him with prejudice.

DATED this 15th day of March, 2023.

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## **CERTIFICATE OF SERVICE**

I hereby certify that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF System, which in turn automatically generated a Notice of Electronic Filing (NEF) to all parties in the case who are registered users of the CM/ECF system.

DATED this 15th day of March, 2023, at Olympia, Washington.

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